IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1021 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

NARANBHAI GORDHANBHAI BRAHMAN & 4 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR YOGESH S LAKHANI for the appellants.
MR PD BHATE, APP, for the respondent-State.

==========

CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 14/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellants along with one Rupa Bhana Vazir came to be tried by the learned Special Judge (Atrocity) and Additional Sessions Judge, Banaskantha, at Palanpur, in Special Case No.12 of 1998, for offences punishable under Sections 302 read with Sections 147, 148 and 149 of I. P. C., Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("Atrocities Act" for short) and Section 135 of the Bombay Police Act. The Trial Court, by judgment and order dated 22nd September, 1998, convicted the appellants for offences punishable under Section 302 read with Sections 147, 148 and 149 of I. P. C., Section 3(2)(v) of the Atrocities Act and Section 135 of the Bombay Police Act and sentenced them to undergo rigorous imprisonment for six months and to pay a fine of Rs.100/-, in default, to undergo simple imprisonment for a further period of 15 days for the offence punishable under Section 135 of the Bombay Police Act and further sentenced them to undergo imprisonment for life for rest of the offences under the I. P. C. as well as Atrocities Act. Accused-Rupa Bhana came to be acquitted by the Trial Court.

2. As per the prosecution case, the incident occurred on 24th July, 1997, at about 10.00 A.M., in the outskirts of village Sanval of Vav Taluka of Banaskantha District. The incident occurred in the field of Parbatabhai Govabhai Harijan, where it is alleged that the present appellants attacked Parbatabhai with weapons like stick, iron pipe and axe. They committed the assault in an indiscriminate manner and caused as many as 22 injuries to the deceased. Thereafter, dragged him to an adjoining field. The incident is claimed to have been witnessed by three sons of the deceased, namely, Ranchhod, Hanjari and Pana. Ranchhod informed the relatives and then informed the police, who recorded his F.I.R. and registered the offence. On the basis of the F.I.R., investigation was made and the police, having found sufficient evidence against the six accused persons, filed charge sheet in the Court of learned Judicial Magistrate, First Class, at Vav. Since the offence alleged against the accused persons were triable either by a Court of Sessions or a Special Court constituted under the Atrocities Act, the case was made over to the Special Court by the learned J. M. F.C. and Special Case No.12 of 1998 came to be

registered.

2.1 Charges were framed against the accused persons, at Exhibit 5. They pleaded not guilty to the charge and came to be tried.

2.2 The Trial Court, after considering the evidence led by the prosecution, came to a conclusion that the prosecution was successful in establishing charges against accused Nos.1 to 6 (appellants) and recorded conviction, as stated above, while acquitting accused No.6-Rupa Bhana. Being aggrieved by the conviction, present appeal is preferred by the convicts, who are original accused Nos.1 to 5 in the Trial Court.

3. Learned Advocate, Mr. Lakhani, appearing for the appellants has taken us through the record and proceedings. He contended that the entire prosecution case suffers from the defect of improper investigation and biased version given by the witnesses. He submitted that the genesis of the incident is not disclosed by the prosecution. The F. I. R. which is produced on

record is not the real F. I. R. The first version regarding the incident is suppressed by the prosecution. The conduct of the eye-witnesses is unnatural. The alleged recovery of weapon is also defective. The first Police Officer, who received the information regarding the incident, has not been examined as a witness. The owner of the field from where the dead body was found has not been examined. The Investigating Officer has conducted the investigation in a cursory manner by failing to record statements of owners of the neighbouring fields. The conduct of the complainant's side indicate a tendency to implicate more and more persons when, initially, only five persons were sought to be implicated. Later on, the sixth person is added and, still later on, the seventh person is added. Mr. Lakhani also indicated that four of the weapons do not specifically indicate the blood group of the deceased whereas one indicates presence of blood group of the deceased. Mr. Lakhani submitted that the appellants are implicated because of pre-existent enmity between the parties for different reasons. That enmity part has been admitted by the witnesses. Lastly, Mr. Lakhani submitted that the conviction by the Trial Court for offences under the Atrocities Act is not sustainable for the

reason that there is no evidence to show that such an offence is constituted, as required under law. Mr. Lakhani submitted that there is no evidence to show that the victim belonged to Scheduled caste or Scheduled Tribe; that the accused persons do not belong Scheduled caste or Scheduled Tribe; and that the offence was committed by the accused persons on the ground that the deceased belonged to Scheduled Caste or Scheduled Tribe and, in absence of such evidence, the conviction could not have been recorded by the Trial Court.

3.1 Mr. Lakhani, therefore, submitted that the entire prosecution case has wrongly been accepted by the Trial Court while recording conviction and the appeal, therefore, may be accepted and the appellants may be acquitted of the charges levelled against them.

4. Learned Additional Public Prosecutor, Mr. Bhate, has opposed this appeal. According to him, here is a case where the deceased has been done to death by causing as many as 22 external injuries in a broad day light attack. The incident occurred in the

field of the deceased himself and has been witnessed by three of his sons, whose presence at the place is very natural. As regards the conduct of the eye-witnesses, Mr. Bhate, submitted that different persons react in different manner and, therefore, their say may not be disbelieved because they reacted in a particular manner. The witnesses are young persons, one aged about 18 years, another aged about 15 years and the third aged about 12 years. They were intimidated by the assailants and, therefore, their evidence has rightly been accepted by the Trial Court. Mr. Bhate also submitted that the aspect of enmity emerges from the evidence and that would provide motive to the accused for commission of the crime. The Trial Court has appreciated the evidence in its proper perspective and, therefore, the Court may not interfere with the conviction recorded by the Trial Court.

4.1 However, Mr. Bhate was at loss to support the conviction under the Atrocities Act. He had to concede that there is no evidence worth a name which would constitute offence under the Atrocities Act, with which the accused persons were charged and are convicted.

5. We have considered rival side contentions and have examined the record from the angle suggested by rival side.

6. From the evidence on record, we find that the prosecution has examined P.W.2-Ranchhod Parbatabhai (Exhibit 25) and Hanjari Parbatabhai (Exhibit 27) as eye-witnesses to the incident. They both are sons of deceased-Parbatabhai Govabhai. Ranchhod loged the F. I. R. (Exhibit 26). Although it is a question whether Exhibit 26 can be treated as the F. I. R., we propose to deal with this aspect in later part of this judgment. These two witnesses say that they had gone to their field on the day of the incident. The deceased was working in the field and they were cooking after cutting grass. Having heard shouts of the deceased, they rushed out of the shed where there were cooking. They noticed appellants No.1 to 5 assailing the deceased. Appellant No.1 was armed with a stick, appellant No.2 was armed with an iron pipe, appellants No.3 and 4 were armed with axe and appellant No.5 was armed with a stick. They say that the accused persons assaulted the deceased with the respective weapons

indiscriminately. When they tried to approach with a view to intervene or rescue their father, they were intimidated and were told to remain at a distance and, if they tried to reach nearer, they would also meet the same fate. Then they say that the assailants dragged the deceased to the neighbouring field. The witnesses say that then they went to their relative and informed about the incident. Thereafter, they came back to the spot and noticed that the deceased had expired and then they went to Vav Police Station. The first informant, Ranchhod, says that he lodged the F. I. R. over there. They say that, thereafter, they came back to the spot. The P. S. I. of Vav also came to the spot. By that time, it was around 2.00 P.M. Then Mavsari Police was informed and the P. S. I. from Mavsari Police Station came around 5.00 P.M., took the F. I. R. from the first informant, which is Exhibit 26, and then proceeded with the investigation. It emerges from their evidence that statements of other witnesses were recorded on the next day by the Investigating Officer.

6.1 From this version, prima facie, it would appear that

there is no reason to disbelieve these witnesses. Their presence at the place is natural and simply because they are sons of the deceased, their version cannot be disbelieved. But, in our opinion, it would be an error to accept the version of these witnesses and confirm the conviction recorded by the Trial Court.

6.2 It emerges from the deposition of first informant, Ranchhod (Exhibit 25), that he saw the appellants committing assault with their respective weapons. He also saw the appellants dragging his father to the field of Maga Devchand. This witness then says that then he went to call his relatives. He says that all the three brothers together went to call the relatives and then his uncle came back to the spot with them and found that their father had expired. It is, therefore, clear that the first informant and his two brothers were not sure whether their father had expired when he was dragged to the field of Maga Devchand. The natural conduct of a person would be to follow the assailants even at a distance, if one is afraid of the assailants, and to ascertain what is the condition of the victim. It is quite unnatural that all the three sons would neither follow the father nor would they try to know

the condition of their father as to whether he is alive or he has expired. It is also unnatural that all the three of them together left the spot and went to the township to inform the relatives.

7. Apart from this unnatural conduct, the subsequent development in the case is of a serious nature. Although the place of incident falls within the jurisdiction of Mavsari Police Station and although the first informant and his brothers as well as relatives were aware of this, for reasons best known to them they went to Vav Police Station. It is also a relevant factor that Mavsari Police Station is nearer to the place of incident than Vav Police Station. The difference in the distance is sizeable, about 15 kms. No explanation is coming forward as to why they decided to travel 15 kms. more and go to Vav Police Station when they knew that Mavsari Police Station is nearer and the place of incident falls within the jurisdiction of Mavsari Police Station.

7.1 It also emerges from the evidence of the first informant that, after going to Vav Police Station, they went to Mavsari Police Station and there, he lodged the F. I. R. He says that, P. S. I. from

Vav Police Station had accompanied them. In the next breath, the first informant says that the first information was recorded at the place of incident after reaching there with the Police. During cross-examination, he admits they they did not go to Mavsari Police Station after going to Vav and when they returned from Vav Police Station, P. S. I. from Vav Police Station accompanied them to the spot. He also admits that Mavsari Police was informed by P.S.I. Vav after coming to the place of incident through a wireless message. The witness admits that there have been disputes with Nai family on account of right of way and that a complaint was lodged against the father of the first informant in that regard 15 days prior to the occurrence of the incident. He also states that, his father had also lodged a complaint against the Nai family. He also admits that his father had lodged a complaint against the Brahman family and Vazir for a dispute regarding courtyard and theft, respectively. He says that when his father was being beaten, they had raised shouts, but nobody came to their rescue.

7.1.1 Now, therefore, it is clear that this first informant, Ranchhod, had informed only Vav Police Station about the

incident. In this regard, it is relevant to note that, no such information given by the first informant to Vav Police Station has been produced by the prosecution. It can be legitimately inferred that, if they had seen the incident, they would have given some version to Vav Police, as is given in Exhbit 26, and that would be the first information of the incident. The prosecution has not examined P.S.I. Vav and, therefore, it is not possible to know whether the information was reduced into writing by P.S.I. Vav or not. If it is reduced into writing, which P.S.I. Vav ought to have done as the information was in respect of a cognizable offence, that should have been placed on record. But the prosecution has failed to do so. The first informant denies to have lodged any complaint with Vav Police Station, but he says that he had informed Vav Police Station about the incident. If Vav P.S.I. has not reduced into writing what was told to him by the first informant, he ought to have been examined to know what was the information given to him. But the prosecution has failed to do that either.

7.1.2 However, it comes out from evidence of the Investigating Officer, Kesarsinh Kanthaji Jhala (Exhibit 40) that it

had emerged during investigation that the first informant and others informed Vav Police about the incident. However, he did not make any inquiry as to whether names of the assailants were disclosed before Vav Police. He also states that he received information from Vav Police to make inquiry about the names of the assailants as the names were not given to Vav Police Station. The witness also admits that the first informant and others had informed Vav Police Station only to the extent that dead body of their father is lying and that they had not disclosed the names of the accused persons.

7.1.3 It is, therefore, clear that the first informant and others, who had gone to Vav Police Station, informed Vav Police Station only about the fact of dead body of their father lying in the field. They did not disclose names of the accused persons as assailants. The natural conduct of a person would be that, if he had seen the incident as is claimed, he would have disclosed the fact to Vav Police Station and would have intimated how the incident had occurred and who all were involved in the incident. Even if they did not volunteer to give these details, but when they disclose the

fact that dead body was lying, it can be expected natural for the Police Officer, Vav, to ask as to how the incident occurred, whether anybody had seen the occurrence, who are the persons involved or who can be the suspects, the information being that of a cognizable offence. We do not know whether it happened that way as nothing is coming on record. P. S. I. Vav is not examined and the prosecution witnesses, who had gone to Vav also do not disclose. The ultimate fact that remains is the first informant and others did not disclose names of the assailants in the first instance when they went to Vav. Had they really seen the incident, it would not have been natural for them to have not disclosed names of the assailants and, therefore, the version emerging from the depositions of the first informant-Ranchhod and his brother-Hanjari cannot be accepted at the face value. It would be too risky to confirm the conviction on the basis of version of these two witnesses.

8. We find other defects in the prosecution case and the manner in which the investigating agency has acted.

8.1 The first informant goes to Vav Police Station and Vav

P.S.I. does not appear to have registered the offence. Had he done that, he would have certainly sent the same to Mavsari Police, who had jurisdiction to investigate and, therefore, despite having received information regarding the dead body of the deceased lying in the field, Vav P.S.I. has not taken expected legal action.

8.1.1 One could have understood had he remained content with not taking any action. But, instead, he goes to the place of incident, which is falling outside his jurisdiction and after going there, remained there hours together without doing anything except that he sends wireless message to Mavsari. It is left to a wild guess of anyone as to what was P.S.I. Vav doing there for hours together at the place of incident, when it is indicated that he has taken no action.

8.2 The Investigating Officer has taken no steps to know if neighbours had anything to say in the incident. The incident has occurred in a broad day light at about 10.00 A.M. There are neighbouring fields owned and occupied by different persons. The first informant says that his father had raised shouts, following

which they came out of the shed and, therefore, it was expected of the Investigating Officer to have inquired from neighbours, if they had anything to say in this regard. However, P. S. I.-Jhala has, in his deposition, accepted that he did not record statement of any of the neighbours.

8.3 The person, in whose field the dead body was lying, namely, Maga Devchand, has not been examined as a witness.

8.4 The Investigating Officer had reached the spot at about 5 to 5.30 in the evening and recorded the F. I. R. at about 6.00 P.M.. He has not recorded the statements of witnesses till next day, although they were available on the day of the incident when he reached there. No explanation, in this regard, is coming forward.

8.5 The Investigating Officer, though came to know that Vav Police was informed about the incident first, has not made any inquiry in that regard nor has he recorded any statement of the P.S.I. or the P. S. O., Vav. He claims to have received wireless message from Vav, but he has not recorded statements of the

Wireless Operator nor has he obtained copy of entry in the Wireless Register during the course of investigation.

8.6 The complainant's side seems to have a tendency to implicate more and more persons. In the F.I.R. only five persons were involved. Eye-witness, Hanjari Parbatabhai (Exhibit 27) also says that, at the time of the incident, there were only five persons. However, the first informant, on the next day, tried to rope in Brahman Dhanji Gordhan. Subsequently, as it emerges from the deposition of the Investigating Officer, by giving an application, he has roped in Rupa Bhana, as conspirator, who came to be acquitted later on and the Investigating Officer acted to his tune. This tendency to implicate more and more persons has to be viewed from the angle that the complainant's side has grievance against the accused persons as has been admitted by the first informant in his cross-examination. With Narayan Gordhan and Dhanji Gordhan, they had a dispute regarding courtyard and the deceased had lodged a complaint against them. Likewise, with the Nai family also, they had some dispute regarding right of way and there were complaints and counter complaints. Against Rupa

Bhana, there was a complaint of theft lodged by the father of the first informant. Differently put, there has been animosity between the complainant's family and the accused persons.

9. The picture that emerges, therefore, is that the version of the eye-witnesses is not reliable because, at the first instance they did not disclose that they have seen the incident or that the accused persons were the assailants. It is only after they reached the place of incident with P. S. I. Vav and after Mavsari Police arrives upon intimation by P.S.I. Vav that the F. I. R. implicating the accused persons is disclosed and the factum of animosity has come on record. The investigation is also found to be defective, as indicated above. Therefore, in our opinion, the prosecution cannot be said to have proved the case against the appellants beyond reasonable doubt and, hence, the conviction recorded by the Trial Court cannot be confirmed.

10. When the evidence of eye-witnesses is not found to be reliable and involvement of the appellants in the incident is also a matter of doubt, the conviction for offence punishable under

Section 3(2)(v) of the Atrocities Act also cannot be confirmed as there is total lack of evidence regarding the factum of the deceased belonging to a Scheduled Caste or a Scheduled Tribe, the appellants not belonging to a Scheduled Caste or a Scheduled Tribe and the act having been committed by the appellants on the ground that the deceased belonged to a Scheduled Caste or a Scheduled Tribe.

12. In the result, the appeal deserves to be allowed and is hereby allowed. The judgment and order of conviction and sentence of the Trial Court is hereby set aside. The appellants are acquitted of the charges with which they were charged. The appellants No.2, 3 and 4 are ordered to be set at liberty forthwith, if not required in any other case. Bail bond of appellants No.1 and 5 shall stand cancelled. Fine, if paid, shall be refunded to the appellants.

[A. L. DAVE, J.]

[BANKIN N. MEHTA, J.]

gt